

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 7, 2008

**STATE OF TENNESSEE v. COREY DWAN JORDAN a/k/a/ FREDERICK
ANDRE ABERNATHY**

**Appeal from the Circuit Court for Bedford County
No. 16202 Robert Crigler, Judge**

No. M2007-02675-CCA-R3-CD - Filed April 3, 2009

A Bedford County jury found the defendant, Corey Dwan Jordan, a/k/a Frederick Andre Abernathy, guilty of one count of selling 0.5 grams or more of a Schedule II controlled substance (cocaine) and one count of delivery of 0.5 grams or more of a Schedule II controlled substance (cocaine), both Class B felonies. The trial court merged the two counts and sentenced the defendant to eighteen years in the Department of Correction as a Range II, multiple offender. On appeal, the defendant argues that: (1) the trial court erred by denying his motion to sit somewhere other than next to defense counsel at trial; (2) the trial court overruled the defendant's motion to exclude certain hearsay testimony; (3) the evidence was insufficient to sustain his conviction; and (4) the trial court erred by admitting evidence of pending charges against him at his sentencing hearing. The State argues that this appeal should be dismissed based upon an untimely filed notice of appeal. After reviewing the record, we conclude that the notice of appeal was untimely filed and that the interests of justice do not support our waiving of the timeliness requirement in this case. Accordingly, we dismiss the appeal.

Tenn. R. App. P. 3 Appeal as of Right; Appeal Dismissed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and CAMILLE R. McMULLEN, JJ., joined.

Gregory M. Galloway, Nashville, Tennessee, for the appellant, Corey Dwan Jordan, a/k/a Frederick Andre Abernathy.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel E. Willis, Assistant Attorney General; Charles F. Crawford, Jr., District Attorney General; Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The record reflects that the judgment of conviction in this case was entered on September 17, 2007. The defendant did not file a motion for new trial until October 22, 2007, beyond the thirty-day limit for filing a new trial motion established by Rule 33(b) of the Tennessee Rules of Criminal Procedure. The trial court held a hearing the same day the defendant filed the motion; at the end of the hearing, the trial court denied the motion.¹ That same day, the defendant filed a notice of appeal.

The thirty-day filing deadline of a motion for new trial is mandatory, jurisdictional, and may not be extended. See Tenn. R. Crim. P. 33(b), 45(b); State v. Martin, 940 S.W.2d 567, 569 (Tenn. Crim. App. 1997). Consequently, “[a] motion for new trial which is not timely filed is a nullity.” State v. Dodson, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989). Subsequent review or considerations by the trial court or agreements of parties to hear a late-filed motion will not validate the motion for the purposes of appellate review. Id.; State v. Davis, 748 S.W.2d 206 (Tenn. Crim. App. 1987). Failure to file a timely motion for new trial will result in the waiver of all appellate issues that would result in the granting of a new trial. Dodson, 780 S.W.2d at 780; State v. Williams, 675 S.W.2d 499 (Tenn. Crim. App. 1984). Therefore, we conclude that the issues raised by the defendant on appeal, except for his issue concerning sufficiency of evidence, are waived. We acknowledge that this court cannot review those grounds upon which a new trial was sought, but we may review those issues which would result in dismissal. Tenn. R. App. P. 3(e); Williams, 675 S.W.2d at 501; see also State v. Givhan, 616 S.W.2d 612, 613 (Tenn. Crim. App. 1980).

Rule 4(a) of the Tennessee Rules of Appellate Procedure requires the filing of a notice of appeal within thirty days of the entry of judgment or, pursuant to Rule 4(e), the entry of an order denying motion for new trial. Because the defendant’s motion for new trial was a nullity, it did not toll the thirty-day period for filing the notice of appeal. Therefore, the notice of appeal in this case was also untimely. See, e.g., State v. Patterson, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997); Davis, 748 S.W.2d at 207. The timely filing of a notice of appeal is not a prerequisite to the jurisdiction of this court, and this court may waive the requirement in the interest of justice. Tenn. R. App. P. 4(a). However, waiver is not automatic and should only occur when “the interest of justice” mandates waiver. See, e.g., State v. Robert William Rockwell, No. E2006-01717-CCA-R3-CD, 2007 WL 2297817, at *2 (Tenn. Crim. App. Aug. 13, 2007); no perm. app. filed. If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction. Id.; see also Michelle Pierre Hill v. State, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996).

¹No written order denying the motion for new trial appears in the record. Because we conclude that the untimely filed motion for new trial and the trial court’s denial of the motion were nullities, we need not consider whether this court has jurisdiction to consider an appeal where the record contains a transcript of a hearing in which the trial court denies the motion for new trial but does not contain a written order denying the motion.

In a related case in which a defendant filed an untimely motion for new trial, which in turn rendered her notice of appeal untimely, we noted that “[i]n order to secure review of issues relating to the sufficiency of the evidence and sentencing, a timely filed notice of appeal must occur, or a waiver of the timely filed notice of appeal must be sought and obtained in this court.” State v. Heather Massengill, No. E2006-02602-CCA-R3-CD. 2007 WL 2019462, at *2 (Tenn. Crim. App. May 12, 2008); no perm. app. filed. In this case, we note that the State filed its brief, in which it argued that the defendant’s appeal should be dismissed based upon the untimely notice of appeal, on July 3, 2008. In the eight months since the State’s brief put the defendant on notice that the notice of appeal was untimely, the defendant has not sought a waiver of the timeliness requirement. As such, we conclude that the interests of justice do not support waiving the timeliness requirement in this case. We therefore dismiss the defendant’s appeal.

CONCLUSION

Upon consideration of the foregoing and the record as a whole, the defendant’s appeal is dismissed.

D. KELLY THOMAS, JR., JUDGE